U.S. Department of Labor

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Issue Date: 29 November 2005

CASE NO.: 2004-LHC-2664

OWCP NO.: 07-167567

IN THE MATTER OF:

EDDIE A. ISTRE

Claimant

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING COMPANY

Employer

and

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

Carrier

and

STANDARD INSURANCE COMPANY, HARTFORD LIFE & ACCIDENT INSURANCE COMPANY, BLUE CROSS/ BLUE SHIELD OF OKLAHOMA, and HELMERICH & PAYNE, INC.

Intervenors

APPEARANCES:

ARTHUR J. BREWSTER, ESQ.

For The Claimant

LAURIE BRIGGS YOUNG, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Eddie A. Istre (Claimant) against Helmerich & Payne International Drilling, Co. (Employer), National Union Fire Insurance Company of Pittsburg (Carrier), and Standard Insurance Company, Hartford Life & Accident Insurance Company, Blue Cross/Blue Shield of Oklahoma, and Helmerich & Payne, Inc. (Intervenors).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 14, 2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The parties submitted 28 Joint Exhibits and Intervenors submitted one exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant, Employer/Carrier, Intervenors, and the Director. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-23), and I find:

1. That Claimant was involved in an accident on March 20, 2003, which occurred during the course and scope of his employment with Employer.

2. That there existed an employee-employer relationship at the time of the accident/injury.

3. That Employer/Carrier filed a Notice of Controversion on August 11, 2003.

4. That an informal conference before the District Director was held on December 23, 2003.

5. That Claimant has received no disability benefits.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Intervenor's Exhibits: IX-___; and Joint Exhibits: JX-___.

6. That Claimant's average weekly wage at the time of injury was $1,463.40.

7. That no medical benefits for Claimant have been paid by Employer/Carrier.

8. That $19,603.38 in medical benefits for Claimant have been paid by Intervenor, Blue Cross/Blue Shield of Oklahoma.

9. That Claimant reached maximum medical improvement on February 15, 2004, as to his cervical spine.

II. ISSUES

The unresolved issues presented by the parties are:

1. Timely notice of accident/injury.

2. Causation; whether Claimant suffered an injury.

3. The nature and extent of Claimant's disability.

4. Whether Claimant has reached maximum medical improvement as to his lumbar condition.

5. Entitlement to medical benefits.

6. Amount due to Intervenors.

7. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

8. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing, provided a recorded statement on July 28, 2003, and was deposed by the parties on January 12, 2005. (JX-3; JX-21, pp. 18-38). At the time of formal hearing, Claimant was 37 years old and had been married for almost 18 years without filing for separation or divorce. (Tr. 106-107). He worked for Employer approximately ten years and was a "driller" for approximately six years. (Tr. 108, 110). He did not have problems with Employer's personnel or his co-workers. (Tr. 111).

Prior to March 2003, Claimant did not sustain any on-the-job injuries while working for Employer.[2] In 1994, he felt a burning in his neck and down his left arm into his hand; however, he could not attribute the burning sensation to a specific accident or incident and testified that he "just woke up like that."[3] (Tr. 112). He sought treatment with Dr. Richard McGregor. Dr. McGregor ordered a CAT scan that revealed a "spur that was pinching down on the nerve." (Tr. 113-114).

In 1996, Claimant experienced burning in his neck and arm while working offshore and was airlifted from the rig. He again treated with Dr. McGregor. (Tr. 115). He continued to experience similar problems with his neck and arm "off and on" prior to March 2003, but was able to continue performing his job duties.[4] (Tr. 116-117). He could not identify particular activities that would trigger the burning sensation. (Tr. 116). He would treat his neck pain with aspirin or ointments. (Tr. 168). Claimant did not have back problems prior to March 2003. (Tr. 116).

On March 20, 2003, Claimant was employed as an offshore "driller" and worked fourteen days on and fourteen days off. Marlon Droddy was his "rig superintendent" during seven of the fourteen days and Chris Rawson was his superintendent during the remaining seven days. His immediate supervisor was Jerry Snoddy. (Tr. 117-118).

In March 2003, Claimant slipped and fell while walking down a flight of stairs, hitting the steps with his "butt." He testified that a "Halliburton hand" was present when he fell and that his back hurt and was bruised after the fall.[5] (Tr. 119). He was able to finish his "hitch," but was in pain due to hurting in his back and "butt." (Tr. 120). The crew knew he fell and a co-worker provided Neosporin. (Tr. 120-121, 171).

Claimant experienced swelling as a result of the accident, which caused difficulty laying down and walking. (Tr. 121, 171). Claimant testified he reported the accident to Mr. Snoddy on the next day. Mr. Droddy was likely not on the rig at the time of the accident, but was present at sometime when it was discussed. (Tr. 121-123). He did not file an accident report at that time because he was embarrassed and concerned about "the rig getting another job." (Tr. 123). He testified that no one told him to fill out an accident report and that

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[2] Claimant "got something in [his] eye and got [his] leg smashed" while working for Greywolf Drilling, before he was employed by Employer. (Tr. 111-112).

[3] A memorandum in Claimant's personnel file dated December 16, 1994, indicated Claimant left a rig "due to a three year old injury sustained at home causing a pinched nerve." (Tr. 169; JX-7, p. 6).

[4] In 2000, Claimant treated with the Jeff Davis Chiropractic Center, complaining of neck and arm problems. (JX-21, pp. 34-35).

[5] Claimant identified pictures of "bruising and contusions" taken by his wife in April 2003. (JX-2).

Mr. Snoddy stated "Well I didn't hear nothing" when Claimant indicated he had not seen the medic.[6] (Tr. 124). He did not see the medic because he did not want anything to "affect the rig," although several co-workers suggested that he see the medic. (Tr. 171, 174).

Claimant returned home when his "hitch" ended, but agreed to return to work in place of another employee before the beginning of his next "hitch." (Tr. 122, 178; JX-21, p. 30). Claimant returned to work as a driller and continued to experience "hurting" in his lower back. He testified that his neck and arm continued burning and hurting and he complained to his crewmembers of those problems. (Tr. 127). He was in pain, but was able to work his regular duties. (JX-21, p. 32). Claimant testified that he told Ronnie Atkinson that he was in pain. (Tr. 209). A co-worker allowed Claimant to use Ben-Gay that he received from the medic, which he applied to his neck and shoulder. He testified that his "butt" was beginning to heal. (Tr. 127).

He testified his lower back, "butt," arm, and neck were hurting after the March 2003 accident, although he also indicated that he previously had problems with his neck and arm. After the accident, Claimant experienced "a little more hurting and burning in [his] chest." (Tr. 124). On April 4, 2003, Claimant sought medical attention from Dr. McGregor and complained of "just [his] back at that time because that's what was hurting him." (Tr. 124-125). He did not have "shooting pains." (Tr. 178). He did not see Dr. McGregor again in April 2003 because he thought the burning in his neck and arm would "ease up."[7] (Tr. 129-130).

During the remainder of April 2003, Claimant experienced non-shooting pains in his back and experienced burning, shooting pains in his neck and arms.[8] (Tr. 129). Claimant worked offshore in May and June 2003 and continued to have "hurting" in his lower back and "butt," along with the same neck and arm symptoms. (Tr. 130-132). He testified that he was able to carry out his job duties and was not involved in any additional accidents after March 2003. (Tr. 131-132, 135, 137).

At the end of June 2003, Claimant was transferred to a land rig and attended schooling in Austin, Texas. He experienced constant pain in his "butt." His neck, arm, and chest pain remained the same. Towards the beginning of July, he attended schooling in Houston, Texas, and had increased pain in his "butt," chest, neck, and arm. (Tr. 135). He testified that Mr. Droddy saw him holding his arm in

[6] Claimant also testified that filing an accident report is the responsibility of the injured person. (Tr. 175).

[7] On prior occasions, the neck and arm pain would subside after approximately one month. (Tr. 130).

[8] His neck and arm pain was greater and "more in [his] chest" than prior to the March 2003 accident. (Tr. 129).

school and asked what was wrong. He replied that his arm and neck were burning. (Tr. 135, 208).

From July 14, 2003 through July 19, 2003, Claimant worked on the land rig and operated the drill from a seated position. (Tr. 138-139). On July 19, 2003, Claimant could not sleep after his shift due to pain. (Tr. 139-140). He called Mr. Droddy and stated he was going to see his doctor because of the pain in his neck and arm. (Tr. 139, 226). He told Mr. Droddy that the pain was affecting his nerves. He testified that his lower back and "butt" continued to hurt, but not as badly as his neck. (Tr. 139-140).

Although Claimant testified that his neck, arm, and back pain continued and got worse over time, he never filed an accident report because he "thought it would get better." (Tr. 176). Despite his continued pain, Claimant never saw a medic because he did not want to fill out a report. (Tr. 127, 177).

Claimant testified that he quit his job because of neck and arm pain; he did not quit his job because of the drive to the land rig or the living arrangements. (Tr. 141-142). After he quit his job, Claimant again sought treatment with Dr. McGregor and reported pain in his neck and arm. (Tr. 146). He did not report back pain because his back was not hurting badly. (Tr. 200). An MRI and myelogram revealed that Claimant's problem involved the same disc that had been problematic before the March 2003 accident. (Tr. 200-201). Dr. McGregor referred Claimant to Dr. Holland, who found a "large herniated disc" in Claimant's neck and indicated Claimant "would lose it in [his] whole left" arm if left untreated. (Tr. 146-147).

On August 14, 2003, Claimant filled out a questionnaire during his examination by Dr. Holland in which he failed to identify a back problem, but indicated that he had a neck and arm problem since "July 2." (Tr. 201-202; Employer/Carrier's Post Hearing Brief, Exhibit A). He did not describe the accident or indicate the date and location of the injury. (Tr. 202). Claimant continued treating with Dr. Holland at the time of formal hearing. (Tr. 203). He testified that he discussed back pain with Dr. Holland. (Tr. 204).

On or around July 21, 2003, Claimant notified Employer that he was treating with Dr. McGregor. (Tr. 147; JX-25). After he quit his job, Claimant received approximately six weeks of sick pay and was approved for long-term disability.[9] (Tr. 149, 155). At the time of formal hearing, Claimant had not received workers' compensation benefits and his medicals were paid by his private health insurance. (Tr. 154).

On July 28, 2003, Claimant met with Pat Benfield and provided a recorded statement in which he indicated that his low back and bruise

[9] Claimant received $2,864.00 per month in long-term disability. (Tr. 282).

were not bothering him. (JX-3, pp. 21-22). He stated he hurt his back when he fell at work, but did not feel pain in his neck and arm. (Tr. 191; JX-3, pp. 10-12). However, at formal hearing, he testified that his neck and arm started hurting during the hitch in which the accident occurred. (Tr. 150, 193). At his deposition, he testified that he felt pain in his arm and neck at the time of the accident. (JX-21, p. 28). During the recorded statement, he stated that his neck and arm "hurt a little bit" while he was offshore, but "it wasn't enough to do anything until [he] came to land." (Tr. 151, 192; JX-3, p. 25). However, Claimant also stated that his neck first began hurting while he was at rig school. (Tr. 191-192; JX-3, p. 18).

On cross-examination, Claimant testified that he did not inform Dr. McGregor of his neck and arm injuries during the April 4, 2003 visit. Claimant testified that his neck was "probably" bothering him at that time, but he thought the pain would go away and he was more concerned with his lower back at that time. (Tr. 190). During his recorded statement, Claimant reported that he did not complain of the neck or arm problems and that his neck and arm were not hurting when he saw Dr. McGregor. (Tr. 194; JX-3, p. 25).

During his meeting with Pat Benfield, Claimant filled out an accident report that did not mention back or "butt" pain, but indicated the fall caused "shooting pain and loss of breath" which "advanced to constant burning and pains and numbness throughout whole left arm down to fingers." (Tr. 152-153; JX-1, p. 1).

Claimant underwent cervical surgery recommended by Dr. Holland on August 15, 2003. (Tr. 154, 157). Subsequently, Claimant experienced shooting pains in his right and left legs and burning in his lower back and "butt."[10] (Tr. 158). Dr. Holland referred Claimant to Dr. Tim Best, a neurologist, who performed additional neck and back MRIs. (Tr. 158-159). Dr. Best found hernias in Claimant's neck and lower back. He referred Claimant to Dr. Raggio who recommended and scheduled back surgery.[11] (Tr. 159). Claimant also underwent steroid injections on two occasions at the recommendation of Dr. Raggio. (Tr. 162). At Employer's request, Claimant was examined by Dr. Steiner. (Tr. 163).

Drs. McGregor, Holland, and Steiner have not released Claimant to return to any kind of work activities. (Tr. 163). Claimant's typical activities consist of watching the news, checking the mail, watching his children, and cooking. (Tr. 165). He feels worse after walking or sitting for long time periods. (Tr. 165).

[10] Claimant previously experienced shooting pains in his back while walking up a flight of stairs on the first day he returned to work. (Tr. 126, 158).

[11] The surgery was ultimately postponed. (Tr. 159). The parties stipulated that Employer did not request that the surgery be postponed or continued. (Tr. 160).

Employer has not offered Claimant any kind of work or vocational rehabilitation services. (Tr. 166). During his testimony, Claimant described his arm and neck pain as being "the same as before;" he believed the pain was related to his accident because it did not "ease up" and "got worse." (Tr. 211).

Claimant testified that he did not tell Mr. James Brown that he was quitting his employment. He further testified he did not have an argument with anyone, including his wife, while Mr. Brown was present in his vehicle. (Tr. 280).

Marlon Droddy

Mr. Droddy testified at formal hearing. In 2003, he was Claimant's "superintendent" while working offshore and on the land rig. (Tr. 34). He testified that Claimant was a good worker who was physically able to carry out his duties and never appeared unable to perform his duties. (Tr. 34-35, 73).

From December 2002 until approximately June 2003, Mr. Droddy worked with Claimant on an offshore "BP" rig. (Tr. 36). Mr. Droddy and part of his crew, including Claimant, transferred to a "land rig" and attended seven days of "rig school" in Houston, Texas.[12] (Tr. 36-37, 76). He and Claimant also attended two or three days of additional schooling for managers in Austin, Texas. (Tr. 81-82). On July 14, 2003, he and his crew began working on the land rig. (Tr. 38). While assigned to the land rig, five employees lived in one trailer and drove 45 to 60 minutes to and from work. (Tr. 84-87). Further, the employees were required to provide their own meals. (Tr. 87). According to Mr. Droddy, a driller on a land rig was required to "do more" than on an oil rig. (Tr. 86). Mr. Droddy testified Claimant did not complain about being assigned to a land rig, although all workers complained about driving to the worksite. Claimant did not complain about the living arrangements. (Tr. 60-61).

On July 19, 2003, Claimant phoned Mr. Droddy and indicated that his "nerves was [sic] bad" and he was quitting. (Tr. 47). Claimant previously had not made any complaints regarding his nerves. (Tr. 47). Mr. Droddy filled out a "302 form" indicating Claimant quit and forwarded it to Employer's personnel director, Sherry Boyett.[13] (Tr. 49-50, 90). Claimant did not state that he quit because of the drive to and from work, the living arrangements, the fact that there

[12] The employees were sent to "rig school" to become familiar with the land rig. It consisted of classroom training and no physical labor. (Tr. 37).

[13] On the form, Mr. Droddy wrote "[Claimant] called me and said he had enough. Said he hasn't ate in days and said that his nerves was shot." (Tr. 51-52). He testified that once he sends the form to the personnel department, the personnel department prints it, signs it, and places it in the personnel file. (Tr. 92). A second "302 form" dated August 22, 2003, which Mr. Droddy did not complete, indicates a "change of status" for Claimant and further indicates "[l]eave of absence, workers' compensation pending." (Tr. 54).

was less help on the land rig, or the fact he had to buy and prepare his own meals. (Tr. 102-103).

Sometime between July 19, 2003 and July 21, 2003, Mr. Droddy spoke to the crewmembers. He learned Claimant fell while working offshore and James Brown stated that he saw extensive bruising on Claimant's tailbone area. (Tr. 57-58). Claimant did not indicate that he had an accident or injury at the land rig, nor did Claimant tell Mr. Droddy that he injured himself in a March 2003 accident. (Tr. 66, 73). He testified Claimant would not "make up" being injured in an offshore accident. (Tr. 59).

Claimant complained about "bone spurs" in his neck prior to March 30, 2003, and Mr. Droddy recalled an incident when Claimant was airlifted off a rig. (Tr. 71). Between March 2003 and July 19, 2003, Mr. Droddy interacted with Claimant on a daily basis, but never observed him to have back, neck, or left arm pain. (Tr. 73-75). While in "rig school" and manager school, he did not observe Claimant holding or cradling his arm in pain and Claimant did not inform Mr. Droddy of arm or neck pain. (Tr. 77-78, 82). Mr. Droddy also saw Claimant socially on several occasions during "rig school" and did not observe him to be in pain. (Tr. 79). Mr. Droddy saw Claimant on each of the four days he worked on the land rig; he did not observe Claimant to be in pain nor did Claimant indicate that he was hurting. (Tr. 90).

No one informed Mr. Droddy that Claimant appeared to be hurt or in pain. (Tr. 82). Mr. Droddy did not ask Claimant if anything was wrong with him because he did not have a reason to ask such a question. (Tr. 80). Mr. Droddy testified that Claimant did not tell him of the accident while in his office and that he did not see Claimant's bruises. (Tr. 282-283). He further testified that he did not overhear a conversation between Claimant and other employees concerning the accident. (Tr. 285).

Mr. Droddy would have filled out "paperwork" if he had known Claimant was hurt or if Claimant requested to see a doctor; it would not have caused any repercussions to Mr. Droddy, Claimant, his crew, or Employer. (Tr. 81, 93). Mr. Droddy never filled out an accident report regarding Claimant. (Tr. 105). It is the employee's responsibility to let someone know if he is involved in an accident. (Tr. 283). Mr. Droddy testified that too many "lost time accidents" could affect Employer's ability in securing drilling contracts.[14] (Tr. 68).

Claimant informed Mr. Droddy that he and his wife had a relationship in which they consented to see other people. He testified Claimant had a girlfriend while working on the land rig. (Tr. 96-97). Claimant did not indicate that he was having marital

[14] A "lost time accident" occurs when an employee cannot return to work for his next shift. (Tr. 67).

problems and did not indicate that he left work because of marital problems. (Tr. 97).

James Brown

At formal hearing, Mr. Brown testified that, while at work on March 20, 2003, he found Claimant sitting on the bottom of stairs with his legs extended. Claimant did not appear to be in pain, but later stated his tailbone was hurting and severely bruised. Mr. Brown and co-workers saw bruising on Claimant's tailbone and "butt;" they encouraged him to report the accident and see the medic. (Tr. 229, 255).

Claimant told Mr. Brown that he showed his injury to Mr. Droddy. (Tr. 230). He indicated that he might have broken his tailbone and complained about "his tailbone" for two or three additional hitches. (Tr. 232). He was able to carry out his duties as a driller and sometimes "helped the hands out." (Tr. 234). He performed heavy work including swinging a sledge hammer and climbing ladders. (Tr. 256).

During rig school in Houston, Texas, Mr. Brown did not observe Claimant "cradling or being protective of his arm" nor did Claimant indicate that he had pain in his arm, neck, or back. (Tr. 257). He did not remember Claimant complaining about neck or arm pain during the two years they worked together and first learned Claimant was experiencing sharp neck pains when they carpooled to the land rig. (Tr. 243, 252).

Mr. Brown carpooled with Claimant to the land rig on three occasions and heard a phone conversation in which Claimant told his wife that he was stressed out and his neck was bothering him. More specifically, Claimant indicated that driving on a bumpy road aggravated his already painful neck. (Tr. 238, 242). Although Mr. Brown knew Claimant had fallen in March 2003 and saw the bruise, Claimant never complained that he hurt his neck, back, or arm. (Tr. 252-253).

Mr. Brown told Mr. Droddy that Claimant stated he was stressed and his neck was bothering him.[15] (Tr. 247). Mr. Brown testified that the employees, including Claimant, complained about the ride to work. Claimant did not seem pleased with the "land rig situation." (Tr. 259-260).

Mr. Brown testified that a good safety record is stressed by large companies, such as BP, and would be a factor in "awarding the work out." (Tr. 240). Both he and Mr. Droddy were under an obligation to report an accident that a fellow employee failed to report. (Tr. 248).

[15] Claimant discussed being "stressed" on more than one occasion during their carpool. (Tr. 260).

Kelly Istre

Mrs. Istre testified at formal hearing. She has been married to Claimant for seventeen years and they have three children together. They have never filed for legal separation or divorce and they have never had marital problems. (Tr. 266). Mrs. Istre and Claimant agreed to have an "open relationship" which has never caused marital problems. (Tr. 266-267).

Mrs. Istre testified that she did not have a telephone conversation with Claimant on July 19, 2003, although Claimant phoned her on a regular basis while working offshore or on the land rig. (Tr. 268). She spoke to Claimant on July 18, 2003, but they neither argued nor discussed their marital relationship. (Tr. 268-269).

Claimant told Mrs. Istre that he was involved in a work accident on the day it occurred. Claimant was visibly injured and she photographed the injury when he returned from his "hitch." (Tr. 269-270; JX-2). Claimant was "hurting all over," namely in his tailbone area. Claimant had prior neck problems, but no prior low back problems. He also previously experienced arm, shoulder, and chest pain which she believed was attributable to a "spur." (Tr. 270-271). Mrs. Istre estimated Claimant had three "flare-ups" of neck, arm, and shoulder problems before March 2003 and testified he was always able to work during the "flare-ups." (Tr. 271).

Between April 2003 and July 2003, Claimant complained of neck and chest pain. Although the "tenderness" in his tailbone area continued, his neck pain gradually increased until he "couldn't take it anymore." (Tr. 272). Since his neck surgery, Claimant continues to have discomfort in his neck and his back pain has increased. (Tr. 273).

The accident report and questionnaire for Dr. Holland do not reference back pain because Claimant was mainly concerned about his neck pain. (Tr. 277). Mrs. Istre did not know how to answer inquiries regarding the accident on Dr. Holland's questionnaire because Claimant "wasn't telling [her] much except he wanted to see the doctor."[16] (Tr. 278).

Ronnie Atkinson

Mr. Atkinson was deposed by the parties on March 18, 2005. (JX-17). Claimant was his supervisor and they worked offshore for approximately 20 months. (JX-17, p. 7).

In March 2003, Claimant told Mr. Atkinson that he slipped down some stairs and showed Mr. Atkinson bruises on his "butt."[17] Mr.

[16] Mrs. Istre testified that Claimant spoke to Pat Benfield and filed a claim before he filled out paperwork for Dr. Holland. (Tr. 278-279).

[17] Mr. Atkinson stated that other crewmembers knew of Claimant's bruises. (JX-17, p. 14).

Atkinson did not remember if Claimant complained of pain and did not think he treated with a medic. (JX -17, pp. 9-11). He recalled Claimant complained about arm numbness, but could not remember if the complaints occurred before or after Claimant fell. (JX-17, pp. 11-12, 30). Mr. Atkinson saw Claimant use "Ben-Gay" on his neck "way after" he showed Mr. Atkinson the bruising.[18] (JX-17, pp. 12-13). Claimant did not mention pain in other parts of his body and did not mention neck pain prior to the March 2003 fall. (JX-17, p. 15).

Mr. Atkinson attended one week of "rig school" with Claimant. He did not remember whether Claimant complained about neck or back pain. (JX-17, p. 17). Claimant did not indicate that he was going to quit, nor did he indicate that he was unhappy with his job. (JX-17, p. 23).

While working offshore, Claimant would help his co-workers, performing heavy labor and sometimes strenuous work such as swinging a sledge hammer or carrying items. Mr. Atkinson could not remember whether Claimant continued to assist with such tasks after his fall. (JX-17, pp. 28-29).

Sherry Boyett

Ms. Boyett, who was deposed by the parties on May 5, 2005, was employed by Employer as a "personnel coordinator" in July 2003. She testified that a "302 form" is used to reflect employee status changes, such as a change in salary or a transfer between offshore and land-based rigs. (JX-27, pp. 4-5).

Ms. Boyett testified that a "302 form" filled out by Mr. Droddy indicated Claimant "had enough," had not eaten in days, and "his nerve [sic] was shot." (JX-24; JX-27, p. 7). She received the form on July 30, 2003. (JX-27, p. 12). A second "302 form," dated August 22, 2003, indicated Claimant was on a leave of absence with "pending" workers' compensation. (JX-7; JX-27, p. 8). Ms. Boyett testified the "302 form" was changed because Employer learned Claimant's termination could be related to a possible injury; Employer cannot terminate an employee under such circumstances. (JX-27, p. 8). The August 22, 2003 form was printed, "signed off on," sent to Employer's "HR department," and placed in Claimant's personnel file. (JX-27, pp. 9-10). The original form was not processed and was not placed in his personnel file because his status was changed to a workers' compensation leave of absence. (JX-27, p. 15).

Jeff Flaherty

Mr. Flaherty was deposed by the parties on May 5, 2005. (JX-28). At the time of his deposition, he was employed as the "district operations manager" for Employer's Oklahoma district. (JX-28, p. 5). He had a conversation with LouAnn Murray, who worked in Employer's "HR

[18] Mr. Atkinson later testified that he could not remember whether he saw Claimant using "Ben-Gay" before or after the accident. (JX-17, p. 29).

department," during the week of July 21, 2003, and made notes of the conversation. (JX-28, pp. 9-10). She informed Mr. Flaherty that she spoke with both Mr. Droddy and Claimant and that Claimant could not eat or sleep. She further informed Mr. Flaherty that Claimant had an MRI scheduled. (JX-28, pp. 11-12). Mr. Flaherty testified that Ms. Murray likely indicated Claimant thought he had a work-related injury. (JX-28, p. 13).

Mr. Flaherty did not speak to Mr. Droddy and he did not fill out any "302 forms" regarding Claimant's status. (JX-28, p. 14). He initialed the August 22, 2003 form that indicated Claimant was on a leave of absence. (JX-28, p. 16). He testified that the "302 form" was changed because the initial "302 form" indicated Claimant quit his employment. After speaking to Ms. Murray, Mr. Flaherty learned Claimant alleged a work-related condition and needed to be placed on a leave of absence on the later form. (JX-28, p. 25).

The Medical Evidence

Richard McGregor, M.D.

Dr. McGregor, a general practitioner, was deposed by the parties on January 12, 2005.[19] (JX-20, p. 36). On January 3, 1995, Claimant presented with complaints of pain in his neck, along with shooting pain into his left upper chest, under his arm, and down his left arm.[20] Dr. McGregor diagnosed "compressive nerve group pain." (JX-20, p. 7, Exh. 1, pp. 3-4).

On January 26, 1996, a CAT scan of Claimant's cervical spine revealed "moderate degenerative spurring" involving the "C6-C7" level. (JX-20, pp. 9, Exh. 1, p. 4; JX-13, p. 4). The radiologist noted pressure on the nerve root at that level, which Dr. McGregor opined was the likely source of Claimant's neck and left arm pain. (JX-20, p. 10). At his deposition, Dr. McGregor stated it was possible for symptoms to subside and be tolerable, but aggravation to the area could cause the symptoms to "flare up," resulting in a rise and fall of pain levels at any particular time.[21] (JX-20, p. 11). Upon review of records from the Jeff Davis Chiropractic Clinic, at which Claimant sought treatment in 2000, Dr. McGregor opined the flare-up was consistent with problems Claimant experienced in 1995 and 1996. (JX-20, pp. 15-16, Exh. 3). He further affirmed that Claimant was "a quiet guy and doesn't complain much." (JX-20, p. 18). He stated that job duties requiring lifting or flexion and rotation of the neck would aggravate the pre-existing cervical condition. (JX-20, p. 40).

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[19] Dr. McGregor's credentials are absent from the record.

[20] On December 16, 1994, x-rays performed at Jennings American Legion Hospital revealed a "normal cervical spine." (JX-13, p. 6).

[21] The record contains additional medical documents dated October 6, 2000. These medical records do not identify a physician or hospital, but indicate Claimant sought treatment of his neck, shoulder, chest, and left arm. (JX-19, Exhibit 2).

On April 4, 2003, Claimant complained of falling and injuring his tailbone. Dr. McGregor noted swollen and bruised buttocks, a "massive contusion," and "massive swelling on the right side." Claimant did not report radiating pain or numbness. Dr. McGregor opined Claimant sustained a contusion.[22] He noted there was no palpated soreness to suggest bony injury such as a fracture. (JX-20, pp. 20-21, Exh. 1, p. 6).

On April 4, 2003, Dr. McGregor's notes did not reflect complaints of neck and arm pain. He opined Claimant's neck pain would have been a secondary consideration given Claimant's back pain at that time; he may not have noted neck or arm pain even if it was present. (JX-20, pp. 24-25). Dr. McGregor would be surprised if Claimant's neck condition was not aggravated by the March 2003 fall. (JX-20, p. 44). He agreed with Dr. Holland that Claimant's cervical condition and need for surgery was the result of an aggravation of his pre-existing cervical condition. (JX-20, p. 45). He opined that, as a result of such aggravation, Claimant's cervical disability is worse than it was before the March 2003 accident. (JX-20, pp. 45-46).

On July 21, 2003, Claimant presented with complaints of neck and arm pain consistent with his prior complaints. (JX-20, Exh. 1, p. 6). Additional office notes of July 21, 2003, indicate a "repetitious" neck injury and note a bone spur. (JX-20, Exh. 1, pp. 6, 8). A MRI, a CT scan, and a myelogram were performed on July 22 and 24, 2003, at Dr. McGregor's instruction.[23] (JX-20, Exh. 1, pp. 9-11; JX-13, pp. 1-2, 8). Dr. McGregor identified a "definite problem at 'C6' that explains pain and radiation down arm . . . [d]efinitely aggravated by type of work done." (JX-20, Exh. 1, p. 11). He referred Claimant to Dr. Holland on July 30, 2003. (JX-20, p. 44, Exh. 1, p. 7).

On October 22, 2004, Claimant presented with complaints of back and neck pain, specifically burning pain in his tailbone, down his leg, and into his foot. Claimant also indicated that neck flexion caused burning in his left arm and chest. On January 4, 2005, he presented with similar complaints of pain in his back and neck, as well as shooting pain in his right leg, upper chest, and arm. (JX-20, Exh. 2, p. 1).

Dr. McGregor indicated "it would certainly be suspicious" that there could have been lumbar damage in April 2003 that did not become symptomatic until several months later. (JX-20, p. 54). Additionally, he suggested it was possible for a person to have back pain for seven months before complaining. (JX-20, p. 58). He agreed

[22] At his deposition, Dr. McGregor stated that he could not render an accurate medical diagnosis until Claimant's pain and swelling had subsided. (JX-20, p. 22).

[23] Dr. McGregor testified that there was not a "huge difference" between the 1996 scan and the 2003 scan; he opined the disc protrusion may have been a little bigger on the 2003 scan. (JX-20, p. 33).

it was more probable than not that the back condition he treated in April and October 2003 was related to the March 2003 fall, absent other intervening accidents or trauma to Claimant. (JX-20, p. 60).

Dr. McGregor further testified that Claimant had a cervical impairment prior to the March 2003 accident. According to Dr. McGregor, the cervical condition treated by Dr. Holland was an aggravation of the pre-existing condition which resulted in greater disability. (JX-20, p. 45). He also testified that, although Claimant's cervical condition had "progressed," he did not know whether the progression could be "tied" to the March 2003 accident. (JX-20, p. 31). He stated he would not believe the March 2003 accident caused the onset of neck and arm problems if Claimant did not have neck and arm symptoms until late June or early July 2003. (JX-20, p. 30).

At the time of his deposition, Dr. McGregor had not placed any physical restrictions on Claimant and deferred to the treating surgeon/specialist regarding such restrictions. (JX-20, p. 49). He "hopes" Claimant has not reached maximum medical improvement (MMI). (JX-20, p. 50). He testified that Claimant downplays his symptoms, rather than magnifying them. (JX-20, p. 51).

Michael R. Holland, M.D.

Dr. Holland, a board-certified orthopedic surgeon, was deposed by the parties on September 27, 2004. (JX-19, p. 32). On August 14, 2003, Claimant presented a history of a March 2003 accident that initially resulted in low back pain. He also reported the development of severe neck and upper extremity pain.[24] (JX-19, Exhibit 7, p. 105). Dr. Holland diagnosed a "large C6-C7 disc herniation" and recommended an "anterior cervical diskectomy and arthrodesis" which was performed on August 15, 2003. (JX-19, p. 9; JX-19, Exhibit 7, pp. 17, 39). On September 22, 2003, Claimant reported pain relief with some tingling in his left hand, but Dr. Holland did not note any complaints of back pain. He indicated Claimant could not return to work. (JX-19, Exhibit 7, p. 16).

In November and December 2003 and in January, April, and August 2004, Claimant presented with complaints of pain or burning in his neck and left arm, as well as low back pain.[25] (JX-19, Exhibit 7, pp. 4, 8, 10, 11, 13). On November 14, 2003, a lumbar MRI revealed minor degenerative changes at the "L4-L5" and "L5-S1" levels and identified small disc protrusions. (JX-19, Exhibit 7, p. 12; JX-13, p. 3). Dr. Holland found no definite disc herniation on the MRI. (JX-19, Exhibit 7, p. 12). On August 2, 2004, he supported Claimant's desire to

[24] Dr. Holland's August 14, 2003 office note does not reflect complaints of back pain.

[25] Dr. Holland discussed additional neck surgery to address issue of recurrent arm pain. He felt Claimant was not interested in the surgery and was focused on his back and legs. (JX-19, p. 27).

undergo lumbar surgery by Dr. Raggio and indicated that Claimant's lumbar and cervical conditions resulted from the March 2003 injury.[26] (JX-19, Exhibit 7, p. 5).

He opined changes present at "various levels" in Claimant's July 2003 cervical MRI may have pre-dated March 2003, with the exception of the disc herniation at "C6-C7." (JX-19, p. 11). He could not say to what degree the pre-existing condition constituted a "pre-existing disability" nor could he state whether the pre-existing degenerative changes in Claimant's cervical spine added to Claimant's present degree of disability. (JX-19, pp. 8-9, 12). However, he did testify that the combination of the cervical and lumbar conditions would put Claimant at a higher degree of disability than his cervical injury alone. (JX-19, p. 30). He further testified the cervical herniation was consistent with an acute change. However, he also indicated Claimant would not have been able to continue working if the change occurred on March 20, 2003, and opined Claimant would have been forced to seek medical care for his neck if he had ruptured the disc to the extent present in August 2003. (JX-19, pp. 17-18, 43-44).

Claimant specifically told Dr. Holland that something happened to his neck on the day he fell down the stairs. Dr. Holland believes Claimant's cervical condition worsened with the fall, but he suggested that other scenarios were possible.[27] (JX-19, pp. 17-18). Although he could not quantify the direct affect of the March 2003 accident, Dr. Holland testified that the fall "more probably than not" contributed to Claimant's ultimate cervical condition; he further opined "to a reasonable degree of medical certainty" that the March 2003 accident was a cause of or contributed to Claimant's ultimate cervical condition. (JX-18, pp. 33, 37).

Dr. Holland opined Claimant reached MMI from the cervical surgery after six months and deferred to Dr. Raggio regarding MMI of his lumbar condition. (JX-19, pp. 25, 37). Dr. Holland did not release Claimant to return to work and he continued treating Claimant at the time of his deposition. (JX-19, pp. 26-27). He suggested Claimant undergo a functional capacity evaluation (FCE) following lumbar surgery and he declined to place restrictions on Claimant until Dr. Raggio resolved the lumbar condition. (JX-19, pp. 29, 34). He indicated that a ten percent to fifteen percent whole body impairment rating was reasonable for a one-level cervical fusion, but further indicated that the impairment rating varies from person to person. (JX-19, p. 43).

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[26] Dr. Holland would not perform lumbar surgery on Claimant. He referred Claimant to Dr. Raggio. Dr. Holland recommended epidural steroid injections and pain medication. (JX-19, p. 31).

[27] He agreed that falling down thirteen steps on one's buttocks would be sufficient to aggravate the underlying degenerative conditions in Claimant's cervical spine as shown in 1996 CT scan. (JX-19, p. 36).

Dr. John F. Raggio

Dr. Raggio, who is board-certified in neurosurgery, was deposed by the parties on October 18, 2004. (JX-18, p. 23). He first saw Claimant in February 2004 after a referral from Dr. Best.[28] (JX-18, p. 5). Claimant presented with complaints of lower back pain and "burning neck pain radiating into the left shoulder." (JX-18, p. 6). He indicated his neck pain began in April 2003 and provided a history of an onset of back pain in March 2003. (JX-18, p. 9). Dr. Raggio recommended a discectomy of Claimant's herniated disc at "L4-5." (JX-18, pp. 7-8).

Dr. Raggio agreed that a traumatic injury resulting in a herniation would likely exhibit symptoms earlier than five months following the injury. The information provided by Claimant is the only "evidence" that would link his "lumbar protrusion" to the March 2003 accident. (JX-18, pp. 15-16). Because the lumbar MRI was performed one year after the accident, Dr. Raggio agreed there could be other causes of Claimant's lumbar herniation; however, he had not discussed other causes with Claimant. (JX-18, pp. 16-17).

He agreed that the accident described by Claimant possibly could have caused the lumbar problem identified on the lumbar MRI. He also indicated that the condition could be related to degenerative changes. (JX-18, pp. 24-25). Dr. Raggio stated that a causal association would be weakened by a failure to complain about back pain for a year following the accident and presentation of initial complaints. (JX-18, pp. 26-27).

Dr. Raggio testified that a pre-existing problem at the "C6-7 level" would make that level more susceptible to becoming symptomatic and recurrence of such symptoms would not necessarily require a trauma. (JX-18, p. 21). He further testified that Claimant's pre-existing cervical condition and the March 20, 2003 accident were both contributory to Claimant's current condition. (JX-18, p. 22).

Robert A. Steiner, M.D.

Dr. Steiner, whose credentials are absent from the record, examined Claimant on March 3, 2005, at Employer's request. Dr. Steiner noted Claimant's history of injury and prior medical treatment. Claimant presented with complaints of a burning sensation in his neck and down his left arm, along with headaches and numbness in his left fingers. (JX-12, p. 1). He also complained of low back pain and bilateral buttocks pain, as well as burning in his left leg and foot. (JX-12, p. 2).

Dr. Steiner opined, based on Dr. McGregor's records, that Claimant had a "pre-existing cervical disc herniation with cervical

[28] He testified that he has not treated Claimant; rather, he has taken a history, performed a physical, and made recommendations. (JX-18, p. 6).

radiculopathy" prior to the March 2003 incident. Dr. Steiner further opined the "anterior discectomy and fusion at C6-7" resulted from Claimant's degenerative condition and was not caused by the March 2003 accident. (JX-12, p. 4). He further found it "unlikely" that Claimant's lower back condition was related to the March 2003 accident because of the "gap in treatment and delay of onset of symptoms." (JX-12, p. 4). However, on March 24, 2005, he indicated Claimant's current condition was due to "a combination of the 3/20/03 incident as well as his pre-existing permanent partial disability." (JX-12, p. 6).

Dr. Steiner indicated Claimant was disabled due to his cervical and lumbar conditions and limited his activities to a sedentary physical demand level. (JX-12, p. 5). He did not recommend lumbar surgery because it would not likely improve Claimant's subjective complaints and functional capacity. (JX-12, p. 6).

Dr. T. Best

Dr. Best, whose credentials are absent from the record, examined Claimant on January 27, 2004, pursuant to a referral by Dr. McGregor. (JX-16, p. 1). Dr. Best noted that Claimant's symptoms of neck, back, and left arm pain, as well as low back and left leg pain, had been present since his accident of March 2003 based on his reported history. (JX-16, p. 1). After physical examination, he diagnosed "[s]tatus post cervical spine surgery for disc herniation in August 2003 with persistent cervical and left upper extremity and low back pain." He recommended Claimant take Neurontin and undergo additional MRIs of his cervical and lumbar spine. (JX-19, p. 2).

On February 19, 2004, Dr. Best reviewed Claimant's MRIs of January 28, 2004. He found post-operative changes in Claimant's cervical spine. The MRI of Claimant's lumbar spine showed "left paracentral disc protrusion at L4-5" and "disc bulging and bilateral neural canal narrowing at L5-S1." He recommend Claimant seek a second opinion regarding the changes. (JX-16, p. 3).

James H. Eddy, III, M.D.

Dr. Eddy examined Claimant on March 6, 2005, pursuant to a referral by Dr. Raggio.[29] (JX-15, p. 1). Claimant reported neck pain and lower back pain that extended into his left leg and foot. (JX-15, p. 1). Dr. Eddy diagnosed "cervical and lumbosacral radiculopathy" and noted Claimant wanted to concentrate on his leg pain. (JX-15, p. 2). Dr. Eddy performed nerve root blocks on March 14, 2005 and March 29, 2005, but Claimant only felt relief with the first injection. (JX-15, pp. 3-6).

[29] Dr. Eddy's credentials are absent from the record.

The Therapy Center

On November 18, 2003, an "initial evaluation" referenced a diagnosis of a disc bulge at "L4, L5" and noted complaints of a burning sensation in Claimant's low back, as well as pain in his left hip and left lower extremity. Additionally, Claimant complained of burning and numbness in his left upper extremity; he denied having neck pain. (JX-14, p. 14). Claimant underwent physical therapy treatments approximately three times per week from November 18, 2003 until December 28, 2003 and continued to present with similar complaints. (JX-14, pp. 1-14, 49). On November 24, 2003, his complaints included burning in his chest, left shoulder, and left arm, as well as neck pain. (JX-14, p. 11). On December 1, 2003, Claimant also presented with "radicular symptoms" in his right lower extremity. (JX-14, p. 11). A "discharge summary" dated January 12, 2004, noted Claimant presented with increased symptoms on December 28, 2003, and was returning to his physician for additional tests. (JX-14, p. 49).

Claimant again underwent physical therapy between June 22, 2004 and July 23, 2004, for symptoms of pain in his neck and back and for "radicular symptoms" in his left upper and lower extremities. The physical therapist recommended discontinuation of physical therapy because Claimant did not benefit from treatment. (JX-9, p. 89).

The Vocational Evidence

A functional capacity evaluation (FCE) was performed on January 16, 2004.[30] It indicated Claimant could sit, stand, walk, or drive for four hours each during an eight-hour workday. Claimant could occasionally lift or push/pull 21 pounds to 50 pounds. He could climb, balance, stoop, kneel, crouch, or crawl on an occasional basis. (JX-9, p. 102). The FCE indicated Claimant could constantly perform the following activities: reaching above shoulder, reaching at waist level, reaching below waist level, gross motor activities, fine motor activities, and "feeling." Claimant was restricted to sedentary work until further notice and was further restricted from using a sledge hammer. (JX-9, p. 103).

A second FCE was performed on November 11, 2004. It indicated Claimant could sit for two hours to three hours during an eight-hour work day. He could stand, walk, or drive for one hour each during an eight-hour work day. Claimant could frequently lift or push/pull one pound to ten pounds and could occasionally lift or push/pull eleven pounds to twenty pounds on an occasional basis. He could occasionally perform balancing activities, but could never climb, stoop, kneel, crouch, or crawl. (JX-9, p. 84). The FCE indicated Claimant could occasionally perform above the shoulder or below waist level reaching activities. He could frequently perform waist level reaching activities. Claimant was restricted from repetitive use of his right

[30] The record contains two signed functional capacity evaluation forms, but the physician's name is illegible on both. (JX-9, p. 103).

and left foot and left hand. He was not released to return to work. (JX-9, p. 85).

The Contentions of the Parties

Claimant contends he sustained injuries to his neck and back as a result of the March 20, 2003 work-related accident. He further contends he is entitled to temporary total disability from July 20, 2003 through present and continuing as a result of his work-related injuries. Claimant argues he is entitled to medical treatment for the neck and back injuries. He requests reimbursement for all medical expenses, including expenses paid by Intervenors.

Employer/Carrier argue Claimant is not entitled to workers' compensation benefits as a result of the alleged low back injury because the accident did not result in either a permanent disability or lost time from work. Employer/Carrier further contends Claimant is not entitled to workers' compensation because he did not sustain an injury or aggravation to his cervical spine. They argue Claimant's testimony is not credible. Employer/Carrier contend they are entitled to Section 8(f) relief if Claimant's lumbar and/or cervical conditions are found related to the March 2003 accident.

The Director contends Employer/Carrier are not entitled to Section 8(f) relief, arguing Claimant did not have a pre-existing permanent partial disability. The Director further contends that the alleged pre-existing disability was not manifest to Employer/Carrier and that Employer/Carrier failed to show Claimant's present disability is "materially and substantially greater" than it was prior to March 20, 2003.

Intervenors contend they have paid a total of $19,603.38 on behalf of Claimant since the time of his alleged injury. They also contend that long term disability payments have been paid, totaling $50,134.87 and continuing at a monthly rate of $2,864.85. Intervenors argue they are entitled to recovery of all medical expenses or long term disability benefits paid to or to be paid to Claimant.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Claimant's Credibility

Employer contends Claimant's testimony cannot be considered credible because of Claimant's own inconsistent statements and the contradictory testimony of other witnesses.

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

Claimant's recorded statement of July 28, 2003, contains several internal inconsistencies. In response to questioning on at least **three** occasions during the recorded statement, Claimant stated that he did not hurt his neck on March 20, 2003, or that his neck did not begin to hurt until approximately one month prior to giving the recorded statement. Only once during the recorded statement did he state that his neck and arms "hurt a little bit" while he was working offshore, but it "wasn't enough to do anything until [he] came to land."

At formal hearing and during his deposition, Claimant testified that his neck and arm began hurting at the time of the accident. Nonetheless, Dr. McGregor did not identify such complaints on April 4, 2003. Dr. McGregor testified that he may not have noted complaints of neck and arm pain, even if Claimant presented with such symptoms. However, Claimant explained, during his recorded statement, that he did not complain of neck or arm problems during the April 4, 2003 examination because he "wasn't hurt there."

At formal hearing, Claimant also testified that he complained to fellow crewmembers about continued pain in his arm and neck while working offshore. However, contradictory testimony was provided by Mr. Droddy and Mr. Brown. Mr. Droddy denied having knowledge of Claimant's arm and neck pain. Further, Mr. Brown first learned of Claimant's neck pain while carpooling with Claimant to the "land rig." Claimant testified that he was "cradling" his arm during "rig school;"

Mr. Droddy and Mr. Brown denied seeing Claimant do so. Although, Mr. Atkinson testified that he saw Claimant using "Ben-Gay" on his neck, he could not recall whether it occurred before or after Claimant's accident.

I find that the inconsistencies in Claimant's testimony raise significant questions about Claimant's credibility. While each inconsistency alone may not be sufficient to discredit Claimant, the effect of the contradictions when considered as a whole significantly diminishes the weight to be afforded to his testimony. In light of the inconsistencies within Claimant's own statements, as well as the conflicting testimony of other witnesses, I find Claimant's testimony generally lacks credibility and should be given credence only if corroborated.

B. Timely Notice Under Section 12(a)

Section 12(a) of the Act provides that notice of an injury or death for which compensation is payable must be given within 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. It is the claimant's burden to establish timely notice. See 33 U.S.C. §912(a).

Failure to provide timely notice of an injury, as required by Section 12(a), bars a claim unless it is excused under Section 12(d) of the Act. Pursuant to Section 12(d), the failure to provide such notice of an injury to an employer will not act as a bar to the claim if the employer either (1) had knowledge of the injury or (2) was not prejudiced by the lack of notice. See 33 U.S.C. §912(d)(1),(2); See Sheek v. General Dynamics Corp., 18 BRBS 151 (1986), decision on recon., modifying 18 BRBS 1 (1985).

In the absence of evidence to the contrary, Section 20(b) of the Act presumes that the notice of injury and the filing of the claim were timely. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, to establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure to provide timely notice pursuant to Section 12. See Cox v. Brady-Hamilton Stevedore Company, 25 BRBS 203 (1991); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged injury or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (CRT) (5th Cir. 1978); Addison v. Ryan Walsh Stevedoring Company, 22 BRBS 32 (1989).

In the present claim, Claimant alleges that an accident and injury occurred on March 20, 2003. Claimant testified that he reported the accident to his supervisor, Mr. Snoddy, on the following day. According to Claimant, Mr. Droddy was present during a discussion of the accident and injury, but Claimant did not provide the date of such discussions and Mr. Droddy denied having any knowledge of the accident or injury prior to July 19, 2003. Claimant did not file an accident report until July 28, 2003. (JX-1, p. 1). Consequently, I find and conclude the record does not support the Section 20(b) presumption of timely notice of injury because the record contains evidence to the contrary.

I find and conclude Employer did not have knowledge of Claimant's alleged accident and injury prior to July 19, 2003. Although Claimant testified that fellow crewmembers were aware of the accident and possible injury, which is arguably supported by the testimony of Mr. Brown and Mr. Atkinson, Section 12(c) of the Act requires a claimant to provide notice to the employer's designated agents or other responsible officials. Claimant testified that he reported the incident to Mr. Snoddy after the accident occurred. However, I have already discounted Claimant's testimony as incredible due to many inconsistencies and contradictions and there is no additional witness testimony or record evidence to corroborate Claimant's statement.

Mr. Droddy testified that he became aware of the alleged accident or injury sometime between July 19, 2003 and July 21, 2003, when he began discussing the situation with Claimant's fellow crewmembers. Mr. Droddy's testimony is the only evidence of record to suggest when he was first informed of Claimant's work-related accident. Because he did not clearly state whether his discussions with Claimant's co-workers occurred on July 19, 2003, July 20, 2003, or July 21, 2003, I find that Employer first received notice of Claimant's alleged accident or injury on July 20, 2003. Consequently, I find and conclude Claimant did not provide timely notice of his work-related injury.

Nonetheless, I find and conclude Employer was not prejudiced by Claimant's failure to provide notice within 30 days of the alleged accident and injury. Employer has presented no evidence showing that it was unable to effectively investigate any aspect of the present claim due to the lack of notice. While the delayed notice arguably made it more difficult for employer to investigate the claim, the allegation of difficulty in investigating is not sufficient to establish prejudice. See Williams v. Nicole Enterprises, 21 BRBS 164 (1988). Consequently, I find and conclude Employer was not prejudiced in its ability to effectively investigate to determine the nature and extent of the alleged injury or to provide medical services.

Based on the foregoing, I find and conclude the present claim is not barred under Section 12(a) for failure to timely provide notice of the claim because Employer was not prejudiced by the untimely notice.

C. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

In the present case, the parties agree Claimant was involved in an accident while at work on March 20, 2003. However, the parties dispute whether Claimant sustained a compensable injury or injuries as a result of the March 20, 2003, work-related accident.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

a. The lumbar injury

Claimant presented to Dr. McGregor with visible bruising and swelling on April 4, 2003. The bruising is further evidenced by photographs taken by Ms. Istre. Additionally, Mr. Brown, Mr. Atkinson, and Ms. Istre each testified to seeing bruising on Claimant's "butt." Mr. Brown and Ms. Istre further testified that Claimant complained of pain or tenderness in his "tailbone" following

the accident. Dr. Holland's August 14, 2003 report also indicates Claimant provided a history of initially having low back pain following the accident. Accordingly, despite the inconsistencies in Claimant's testimony, I find his subjective complaints of pain in his back and buttocks following the March 20, 2003 accident to be credible because the complaints are corroborated by other witnesses and Claimant's objective medical records.

Further, Claimant underwent MRIs of his lumbar spine in November 2003 and in January 2004, which revealed a disc protrusion at the "L4-L5" level.[31] Dr. Holland indicated that Claimant's lumbar condition resulted from the work-related injury of March 2003. Dr. Raggio testified that the accident, as described by Claimant, could have caused the problems shown on Claimant's lumbar MRI. Accordingly, I find the evidence of record establishes that Claimant's lumbar condition could have been caused by his work-related accident, despite Claimant's failure to present complaints of back pain between April 2003 and October 2003.

b. The cervical injury

In July 2003, a cervical CT scan, cervical MRI, and cervical myelogram respectively identified a large disc protrusion, a "large defect," and a large disc herniation at Claimant's "C6-C7" level. Dr. McGregor noted the "problem at C6" was aggravated by the type of work performed by Claimant and testified that Claimant's pre-existing neck condition could have been aggravated by the March 2003 fall. On August 14, 2003, Dr. Holland indicated that there was "no question" that Claimant's cervical condition resulted from his March 2003 injury. Accordingly, I find Claimant has established that the work-related accident of March 2003 could have aggravated his cervical condition.

Based on the foregoing, I find and conclude Claimant has established a **prima facie** case that he suffered lumbar and cervical injuries under the Act, having established that he suffered a harm or pain on March 20, 2003, and that working conditions and activities on that date could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

[31] Dr. Holland also referred to a herniation at Claimant's "L4-L5" level.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. See O'Kelley v. Department of the Army/NAF, 34 BRBS 39 (2000); Stevens v. Todd Pacific Shipyards, 14 BRBS 626 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

It is noted that Claimant initially complained of an injury to his "tail bone" and presented with "swollen and bruised buttocks" during the April 4, 2003 visit with Dr. McGregor. However, he failed to present subsequent complaints of back pain to any physician until November 2003, approximately seven months after the work-related accident.

Dr. Raggio testified there could be other causes of Claimant's lumbar herniation, aside from the March 2003 accident. Although he did not discuss other causes with Claimant, he testified that the condition could be related to degenerative changes. He further testified that a traumatic injury resulting in a herniation would likely exhibit symptoms sooner than five months following the injury and Claimant's failure to complain about back pain for a "year" following the accident weakens the causal association.[32] Dr. Steiner also opined that Claimant's lower back complaints were not likely related to the March 2003 fall because of the "gap" in treatment and the delayed onset of symptoms.

With regard to Claimant's cervical injury, Dr. Holland believed the condition worsened with the March 2003 accident, but also testified to the possibility that other scenarios could have caused the worsening. Dr. Steiner opined Claimant's cervical herniation existed prior to the March 2003 fall and that the need for surgery was caused by a degenerative condition, rather than the work-related accident.

Based on the foregoing, I find and conclude Employer has presented substantial evidence to rebut the Section 20(a) presumption. Therefore, the record evidence as a whole must be weighed and evaluated to determine work-relatedness and causation.

3. Conclusion or Weighing All the Evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

[32] It is noted that Claimant's complaints of back pain to physicians occurred immediately following the accident and again in October 2003.

a. The lumbar injury

Dr. Holland opined in August 2004 that Claimant's lumbar condition resulted from the March 2003 injury based on the history presented by Claimant. He agreed that Dr. McGregor's office notes described an accident and complaints that were consistent with a "fall on the buttocks which may cause back problems." He further agreed the accident described by Claimant could cause the back complaints made to him and Dr. McGregor. He specifically agreed Claimant's back complaints "more likely than not" related to the March 2003 accident.

Dr. Raggio agreed that Claimant's work-related accident could have resulted in his lumbar problems, but also indicated such condition could have a degenerative cause. According to Dr. Raggio, the "association" between the March 2003 fall and the problems at Claimant's L4-L5 level is "weaken[ed]" because Claimant did not complain of back pain between April and July 2003. Dr. Raggio would have expected an earlier presentation of symptoms if Claimant's herniation had resulted from a traumatic injury. Dr. Steiner expressed a similar opinion.[33]

I find the differing opinions of Drs. Holland, Dr. Raggio, and Steiner are equivocal because both treating physicians are board-certified and provide well-reasoned opinions. I further find these medical opinions alone would provide a balanced record, at best, and would not satisfy Claimant's burden of establishing a work-related injury by a preponderance of the evidence. Moreover, I find Claimant clearly fails to meet his burden when these medical records are considered in conjunction with the following: (1) he did not mention back pain during any doctor visits between April 4, 2003 and November 6, 2003; (2) he did not seek medical attention from Employer's medical services, but continued to work his regular duties; (3) he failed to reference low back pain in the accident report filed in July 2003; (4) he admittedly did not reference low back pain in the questionnaire filled out in conjunction with Dr. Holland's treatment; and (5) he stated that his lower back and bruise were not bothering him during the recorded statement taken on July 28, 2003.

Based on the foregoing, I find and conclude the record does not support a finding of a compensable lumbar injury, as Claimant has not proven by a preponderance of the evidence that his lumbar condition is related to the March 2003 accident. See Greenwich Collieries, supra.

b. The cervical injury

I find the record evidence is equivocal regarding the date of onset of Claimant's neck pain. Claimant's testimony that his neck pain began at the time of the March 2003 accident is contradicted by

[33] Dr. Steiner's credentials are not included in the record and he was not deposed by the parties.

the testimony of Mr. Droddy and Mr. Brown, as well as Claimant's own recorded statement in which he repeatedly stated the onset of pain occurred approximately one month earlier or while he was in rig school. I also find Claimant's testimony is not supported by his failure to seek attention from Employer's medical services and by the questionnaire which indicated that he began experiencing neck pain on July 2, 2003. Nonetheless, Claimant's testimony regarding the onset of neck pain is corroborated by the testimony of Mrs. Istre. Although Mrs. Istre has an interest in the outcome of this matter, there has been no cogent or rational basis present to discredit her testimony based on the instant record.

Dr. Steiner opined that Claimant's cervical surgery resulted strictly from a degenerative condition and was not related to the March 2003 accident. Dr. McGregor also indicated that, assuming Claimant experienced no neck or arm pain until late June or early July 2003, Claimant's cervical injury would not be related to the March 2003 accident.

I decline to afford persuasive weight to Dr. Steiner's opinion because his credentials are absent from the record and he examined Claimant on only one occasion. Accordingly, greater weight is afforded to the opinions of Claimant's treating physicians. Although Dr. McGregor is one of Claimant's treating physicians, I do not accord probative weight to his opinion that the March 2003 accident aggravated Claimant's pre-existing condition. He was uncertain whether the progression of the cervical condition was "tied" to the job accident. Moreover, I am not persuaded by his suggestion that the cervical condition is not connected to the work-related accident because the opinion is based upon the assumption that Claimant did not experience neck or arm pain until late June or early July. As previously discussed, the record evidence does not clearly establish the date of onset of Claimant's neck and arm pain. Thus, I find it would be unfair to conclude Claimant's injury is not causally connected to the work-related accident based on such an unsupported assumption.

However, I am persuaded by Dr. McGregor's opinion that Claimant's pre-existing condition would have been aggravated by the March 2003 accident because it is not qualified by an assumption. Further, Dr. Holland unequivocally opined that Claimant's pre-existing condition was aggravated by the accident which "more probably than not" and to a "reasonable degree of medical certainty" was a cause of or contributed to his ultimate cervical condition. Dr. Raggio testified Claimant's cervical spine was susceptible to aggravation at the C6-C7 level.

Based on the foregoing, I find and conclude Claimant has established that his cervical condition was aggravated by his March 2003 fall. Accordingly, I further find and conclude Claimant's cervical injury was causally related to his employment with Employer.

D. Nature and Extent of Disability

Having found that Claimant suffers from a compensable cervical injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A finding of disability may be established based on a claimant's credible subjective testimony. Director, OWCP v. Vessel Repair, Inc., 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

Claimant returned to work after the March 2003 accident and continued working his usual job duties until he resigned on July 19, 2003. Accordingly, I find and conclude Claimant was not disabled from March 20, 2003 through July 19, 2003, because he has not demonstrated an economic loss.

Claimant's testimony arguably suggests he was unable to return to work and perform his regular job duties after July 19, 2003. Although I do not credit Claimant's testimony in itself, it is supported by insurance forms signed by Dr. Holland in 2004, in which he opines Claimant's disability began on July 19, 2003.[34] Further, Dr. McGregor's office notes do not address Claimant's ability or inability to return to work. Consequently, I find there is no record evidence to contradict the assigned disability date of July 19, 2003.

Dr. McGregor deferred to Claimant's treating surgeon or specialist regarding physical restrictions. At the time of his deposition, Dr. Holland had not released Claimant to return to work. He declined to assign physical restrictions until Claimant's lumbar condition was resolved through treatment with Dr. Raggio. In Dr. Steiner's opinion, Claimant could perform sedentary work. Additionally, neither FCE contained in the record releases Claimant to his regular job duties. Consequently, I find and conclude Claimant

[34] On March 22, 2004, April 22, 2004, and June 2, 2004, Dr. Holland signed insurance forms that indicated Claimant's disability began on July 19, 2003. (JX-19, pp. 76, 78, 79).

has been unable to return to his regular job duties from July 20, 2003 through present and continuing.

Based on the foregoing, I find and conclude Claimant has established a **prima facie** case of total disability from July 20, 2003 through present and continuing.[35]

In the present matter, the parties stipulated that Claimant reached MMI for his cervical injury on February 15, 2004. Accordingly, I find and conclude Claimant is entitled to temporary total disability compensation from July 20, 2003 through February 14, 2004, based on his average weekly wage of $1,463.40. I further find and conclude Claimant is entitled to permanent total disability compensation from February 15, 2004 through present and continuing, based on his average weekly wage of $1,463.40.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle

[35] Employer did not present evidence of suitable alternative employment.

Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Based on the foregoing, I find and conclude Employer is liable for all reasonable and necessary medical expenses arising out of Claimant's compensable cervical injury.

G. Amount due to Intervenors

Intervenors filed an unopposed Motion to Intervene. Blue Cross/Blue Shield of Oklahoma requested reimbursement of $19,603.38 in medical expenses paid on Claimant's behalf. (IX-1, p. 1). Standard Insurance Company/Hartford Life & Accident Insurance Company further requested reimbursement of long term disability payments made to Claimant which totaled $50,134.87 as of June 1, 2005, and continued in the amount of $2,864.85 per month. Helmerich & Payne, Inc. sponsored both the medical and disability programs, plans, or policies. (IX-1, pp. 1-2).

It is well settled that an insurance carrier providing coverage for non-occupational injuries can intervene under the Act and recover amounts mistakenly paid for injuries determined to be work-related where the administrative law judge concludes that the claimant is entitled to such expenses. See Aetna Life Ins. Co. v. Harris, 578 F.2d 52 (3d Cir. 1978); Quintana v. Crescent Wharf & Warehouse, 19 BRBS 52 (1986); Ozene v. Crescent Wharf & Warehouse, 19 BRBS 9 (1986); see also Plappert v. Marine Corps Exchange, 31 BRBS 109 (1997)(Employer is liable for all injury-related medical expenses paid by claimant's private health insurer, provided the private insurer

files a claim for reimbursement of same). The Board has held that the intervenor is entitled to reimbursement from the proceeds of the compensation award. Pilkington v. Sun Shipbuilding & Dry Dock Company, 14 BRBS 119 (1981).

In the present matter, Claimant sought medical treatment for both his lumbar and cervical injuries. Having found that only Claimant's cervical injury is work-related and compensable, I find and conclude Intervenors are entitled to reimbursement of all reasonable and necessary medical expenses related to treatment of Claimant's cervical injury. As the lumbar injury was not found to be work-related, I further find and conclude Employer is not required to reimburse Intervenors for medical expenses related to treatment of Claimant's lumbar condition.[36] With regard to the long term disability payments, I find and conclude Intervenor is entitled to reimbursement of the total amount paid.

G. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is

[36] Although the parties submitted medical and pharmacy bills regarding Claimant's treatment, the charges related to the cervical injury and the charges related to the lumbar condition are not readily distinguishable from the record evidence as submitted.

not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F.2d 513, 517, 18 BRBS 45 (CRT)(5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. v. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Pre-existing permanent partial disability

The mere fact of past injury does not itself establish disability. There must exist, as a result of that injury, some serious, lasting physical problem. See Director, OWCP v. Belcher Erectors, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985). Based on the facts of a specific case, degenerative disc disease due to the aging process may be a pre-existing disability for purposes of Section 8(f). See, Greene v. J.O. Hartman Meats, 21 BRBS 214 (1988), citing Vlasic v. American President Lines, 20 BRBS 188 (1987).

The Director cites Director v. Belcher Erectors, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985), and Director v. Campbell Industries, 678 F.2d 836 (9th Cir. 1982), as analogous cases in support of its contention that the medical evidence of record fails to establish a pre-existing permanent disability.

In Belcher Erectors, the Circuit Court upheld the ALJ's decision that there was no evidence to support a finding of a pre-existing permanent partial disability, stating that a disability is not established by the mere fact of a past injury. However, unlike the present case, the claimant in Belcher Erectors presented no "contemporaneous" medical opinions identifying a pre-existing disability. Rather, the claimant provided only one medical opinion, made after the second injury, which suggested the claimant suffered from a "decompensated back" and admittedly it could not be determined whether the prior injuries constituted a permanent partial disability. Similarly, in Campbell Industries, the court found the claimant's underlying degenerative disc disease and scoliosis were insufficient to establish a pre-existing permanent disability because it was not diagnosed until after the second injury. Additionally, the court found that the claimant's prior back injuries were not sufficient to establish a pre-existing degenerative disc disease because the claimant was able to return to work without restrictions and without additional medical problems.

In the present case, however, Claimant presented to Dr. McGregor with complaints of neck and arm pain in 1994 and 1996. Although Claimant was able to return to his regular employment without restrictions following each episode of pain, a 1996 CAT scan of his cervical spine revealed degenerative "spurring" at his C6-C7 level. Moreover, Dr. McGregor testified that Claimant's pre-existing cervical condition caused "some impairment" before the March 2003 accident. Furthermore, Claimant was required to seek medical care for flare-ups of his cervical condition, including, being air-lifted from an offshore rig, before his 2003 accident. His physicians opined that he was at increased risk for injury because of his cervical condition which they opined was a "pre-existing degenerative cervical disc at C6-7."

Thus, I find the instant case is unlike Belcher Erectors and Campbell Industries because the medical evidence of record, both prior to and after March 2003, identified a pre-existing cervical condition that caused some impairment and ongoing problems. Further, I find a cautious employer would have been motivated to discharge Claimant because an increased risk of employment related accidents and compensation liability due to Claimant's neck flare-ups and his need to repeatedly seek medical care for the cervical condition.

Based on the foregoing, I find and conclude the record contains objective evidence of a pre-existing permanent partial disability to Claimant's cervical spine.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Company, 23 BRBS 420, 426 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 31 F.3d 1112, 28 BRBS 84, 88 (CRT) (11th Cir. 1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

The Director argues that Vlasic v. American President lines, 20 BRBS 188 (1988), held that medical records demonstrating a mere history of back injuries are not sufficient to meet the manifest requirement in the absence of evidence that the injuries cause serious disability. In Vlasic, the ALJ relied on accident frequency reports that identified several injuries as the basis for finding that the claimant's pre-existing degenerative condition was manifest. The Board reversed and found the records were insufficient to establish a serious pre-existing back problem, as the "PMA records" indicated only a temporary back problem that resolved with no time off from work. Thus, the Board concluded the records could not reasonably alert the employer to the claimant's disc disease or any other serious physical problem concerning the claimant's back.

Unlike Vlasic, Claimant does not simply rely on accident reports to establish that his pre-existing degenerative condition was manifest. Rather, the medical evidence of record which pre-dates Claimant's March 20, 2003 injury diagnosed degenerative "spurring" at his C6-C7 level in 1996. I find that these medical records disclose Claimant suffered from a permanent cervical injury. I further find that such records were available at the time of his injury. Thus, I find and conclude that Claimant's pre-existing cervical injury was manifest to Employer at the time of Claimant's March 2003 injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

It is noted that the Director incorrectly asserts that Employer/Carrier must establish that Claimant's present disability is "materially and substantially greater" than it was prior to March 20, 2003. The requirement that a claimant's ultimate disability be "materially and substantially greater" than it was prior to the second injury applies only to cases of permanent partial disability. In the present case, Claimant has been found to be permanently totally disabled.

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

Dr. Steiner clearly opined that Claimant's current cervical condition is due to a combination of Claimant's pre-existing disability and the March 20, 2003 accident. Dr. McGregor similarly opined that Claimant's cervical condition, as treated by Dr. Holland, was an aggravation of Claimant's pre-existing condition which resulted in a greater disability. Dr. Raggio also testified that Claimant's prior cervical condition and the March 2003 accident were "both contributory" to Claimant's current condition. Only Dr. Holland testified that he could not state to what degree Claimant's pre-existing cervical changes added to the current degree of disability.

I find each of the foregoing medical opinions persuasive on the issue of Employer/Carrier's entitlement to Section 8(f) relief and I afford each opinion equal weight. It is noted that Dr. Holland did not provide a definitive opinion as to whether or not Claimant's pre-existing condition added to his present degree of disability. Accordingly, I find the remaining opinions of record support a finding that Claimant's current cervical disability is not due solely to the March 20, 2003 injury. Even assuming that Dr. Holland's opinion suggests that Claimant's current degree of disability is due solely to the March 20, 2003 injury, I find the opinions of Drs. Steiner, McGregor, and Raggio, when considered together, outweigh his lone opinion.

Based on the foregoing, I find and conclude Employer/Carrier have met their burden of establishing entitlement to Special Fund relief under Section 8(f) of the Act. Accordingly, Employer/Carrier's application for Section 8(f) relief should be granted.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, I find Employer was notified of Claimant's injury on July 20, 2003. Employer/Carrier filed a notice of controversion on August 11, 2003.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[37] Thus, Employer was liable for Claimant's permanent total disability compensation payment on August 3, 2003. Because Employer/Carrier controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by August 17, 2003 to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer/Carrier filed a timely notice of controversion on August 11, 2003 and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a

[37] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[38] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from July 20, 2003 to February 14, 2004, based on Claimant's average weekly wage of $1,463.40, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from February 15, 2004, and continuing thereafter for a period of 104 weeks, based on Claimant's average weekly wage of $1,463.40, in accordance with the provisions of Section 8(a) and 10(f) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2004, for the applicable period of permanent total disability.

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[38] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **August 30, 2004**, the date this matter was referred from the District Director.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 20, 2003, work injury related to his cervical condition, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall reimburse Intervenor Blue Cross/Blue Shield of Oklahoma of all paid medical expenses arising from Claimant's March 20, 2003 cervical injury.

6. Employer/Carrier shall reimburse Intervenor Standard Insurance Company/Hartford Life & Accident Insurance Company of all long term disability compensation paid to Claimant arising from Claimant's March 20, 2003 cervical injury.

7. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Employer/Carrier's Application for Section 8(f) relief is hereby **GRANTED.**

10. After the cessation of payments by the Employer/Carrier, continuing benefits shall be paid pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further notice.

11. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 29th day of November, 2005, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge